

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No.  
04-10319-WGY

\* \* \* \* \*

UNITED STATES OF AMERICA

v.

NOEL HERNANDEZ

\* \* \* \* \*

TRIAL TRANSCRIPT  
(Volume 8)

BEFORE: The Honorable William G. Young,  
District Judge

APPEARANCES:

DAVID TOBIN and NANCY RUE, Assistant United  
States Attorneys, 1 Courthouse Way, Suite 9200,  
Boston, Massachusetts 02210, on behalf of the  
Government

LAW OFFICES OF PARTRIDGE, ANKNER &  
HORSTMANN, LLP (By Peter C. Horstmann, Esq.),  
200 Berkeley Street, 16th Floor, Boston,  
Massachusetts 02116, on behalf of the Defendant

GABRIEL HADAD and DEBORAH HUACUJA, Court  
Interpreters

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23

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1 Courthouse Way  
Boston, Massachusetts

25

July 27, 2005

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1

PROCEEDINGS - 8:56 A.M.

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ease

THE CLERK: All rise. Court is in session, pl

4

be seated.

5

o

THE COURT: Good morning, counsel. We have tw

6

ror's

problems. The first is a juror problem. One of our ju

7

wife is in the emergency room.

8

THE CLERK: Mr. Westberry.

9

m on

THE COURT: Mr. Westberry. Can we identify hi

10

the jury?

11

last

THE CLERK: Yes. He sits in the second to the

12

row in the first seat.

13

THE COURT: All right. You mean the last row

--

14 THE CLERK: Second --

15 THE COURT: -- second to the last seat.

16 THE CLERK: I mean second to the last seat in  
the  
17 first row. I'm all right.

18 THE COURT: In the first row. All right.

19 THE CLERK: He sits right here. No. 6.

20 THE COURT: Yes. All right.

21 THE CLERK: He's the tall man with the glasses

22 THE COURT: So we recognize the juror. His wi  
fe is  
23 in the emergency room. I don't know why.

24 He's with her. Cell phones won't work in the  
25 hospital. We've told him to be available to be contact  
ed by

3

1 the Court at ten minutes after 9:00. I propose to disc  
harge  
2 him.

3 Let's start first with that. I propose to  
4 discharge him. I have no reason to believe this is not  
a  
5 genuine emergency or that he left for some reason havin  
g to

6 do with the deliberations. Is --

7 (Whereupon the Court and the Clerk conferred.)

8 THE COURT: Is there any objection?

9 MR. TOBIN: None from the government, your Hon

or.

10 THE COURT: Mr. Horstmann?

11 MR. HORSTMANN: No, your Honor.

12 THE COURT: Very well. He is discharged and

13 Ms. Smith may tell him.

ith

14 Now, the question is what to do. Consistent w

first

15 my charge and my preferred practice, I can send in the

16 alternate. The first alternate is Ms. Kieval, the lady

--

in

17 there are two alternates, one in the first row and one

18 the second. This would be the first row. And I would

e

19 instruct her to -- I would instruct them all to commenc

20 their deliberations afresh.

21 That's what I prefer. I have done it. It's

also

22 perfectly appropriate. The Rules of Criminal Procedure

23 allow a jury to continue with eleven. Now we're down t

o

24 eleven. Once they're deliberating. I prefer to send i

n an

25 alternate and have them start again and will so order.  
But

4

1 I'll hear you.

2 Any objection to that?

3 MS. RUE: No, your Honor. No.

4 THE COURT: Mr. Horstmann?

5 MR. HORSTMANN: No objection to sending in an  
6 alternate, your Honor.

7 THE COURT: That's how we will proceed.

8 Now, we haven't got them all yet. So that's h  
OW  
9 we're going to proceed.

10 Let's go to the second issue. I -- let me rum  
inate

11 simply to set up for oral argument. Here I really need  
oral

12 argument.

13 I've read both briefs and I've read them with  
care.

14 I've had enough time to check United States v. Woods.  
It

15 says exactly what the government says it says. It's  
16 properly cited and it's properly cited in context.

17 I will tell you I find the government's brief  
very  
18 persuasive. I obviously thought in the Coppola case ab  
out  
19 what I was doing before I said those things that I said  
post  
20 trial whatever I had done in the heat of trial.

21 I -- that's one point. I find the government'  
s  
22 brief very persuasive.

23 There is no evidence here other than heroin.  
24 There's no evidence of cocaine. Mr. Horstmann's refere  
nce  
25 to Rule 29 also resonates with the Court. You all

5

1 understand I'm not making rulings. I'm trying to get y  
ou  
2 set for oral argument.

3 But the law in the First Circuit is that  
4 conspirators, and for substantive crimes, the offenders  
have  
5 to know that they're dealing with drugs. I'm also stru  
ck  
6 by, the statute of indictment speaks of Schedules I and  
II.

7 Well, Schedules I and II have a recipe of drugs, but, f  
or



8 instance, they exclude marijuana. If this were a marij  
uana  
9 offense, and some other drugs, but I use marijuana as a  
n  
10 example, he cannot be convicted. It's got to be a more  
11 serious drug. And that would be a fatal variance, and  
I  
12 don't, I don't think the government disagrees with that  
.

13 And then to tee it really up, Ms. Smith comes  
in  
14 shortly before we come on the bench and says what are y  
ou  
15 going to do and I said I don't know. I'm going to hear  
oral  
16 argument.

17 And so, in an effort to be transparent, freque  
ntly  
18 I come on the bench with a game plan, and oral argument  
can  
19 dissuade me from that. In all honesty I have no game p  
lan.  
20 I must and will adhere to the law.

21 It seems to me we're talking about the state o  
f  
22 mind of Mr. Hernandez. Now, if he agreed -- and to me  
--  
23 we'll start with conspiracy. If he agreed with others  
to

24 deal in serious drugs like heroin, which may be the  
25 appropriate thing to say, and then, and it doesn't have  
to

6

1 be Navarro, it can be the unnamed people who are mentio  
ned  
2 in the testimony, then he can be found guilty of conspi  
racy.

3 If he agreed to aid or abet serious drugs -- well, the  
other  
4 theory is conspiracy -- then he can be found guilty of  
5 actual importation of serious drugs. And I would know  
they  
6 had a reasonable doubt as to whether it was heroin if t  
hey  
7 leave that blank. And I will say that. I've said enou  
gh.

8 Argument which suggests to me what I should sa  
y to  
9 the jury will be helpful. I'll hear the government fir  
st.

10 MS. RUE: Your Honor, you had instructed the j  
ury  
11 previously that if there were to be an alternate you wo  
uld  
12 tell them stop your deliberations, start over from the  
13 beginning.



14 THE COURT: And I will.

15 MS. RUE: The fact that we now have an alterna

16 gives this a perfect opportunity to start with a clean

17 slate. And I believe, your Honor, at this point you te

18 them to stop their deliberations, set aside out of thei

19 mind what they have deliberated on previously, and I pr

20 at this point you provide them with the instructions th

21 provided the Court.

22 THE COURT: Well, let's --

23 MS. RUE: Straight out of the First Circuit co

24 case law.

25 THE COURT: All right, now, let's see here. W

7

1 you properly cite Woods. And let's take -- well, I

2 propose -- I'm with that subject to Mr. Horstmann's swe

3 me off it. And I'm with the second two proposals, the

4 cited. But Woods, which I grant you they said it this

5 and they said it in this context, it's not -- the langu  
age  
6 you want from Woods I can't, I don't think I can go the  
re  
7 because it encompasses marijuana. And you didn't indic  
t  
8 marijuana. In your broadest sense you indicted Schedul  
es I  
9 and II. That's what you did. But giving them a litany  
of  
10 the drugs won't help because there's only evidence of h  
eroin  
11 here. Maybe he didn't know heroin but he knew he had a  
12 serious controlled substance. It would have to -- that  
's  
13 the language I'm, I'm, I'm groping toward, a serious, n  
ot  
14 that marijuana, you know, isn't serious, but in the com  
mon  
15 parlance we think of marijuana as a less dangerous drug  
and  
16 the penalties reflect that.

17 So, suppose I gave Woods, I don't want to say  
need  
18 only prove, that Mr. Hernandez had knowledge that he wa  
s  
19 dealing with a serious controlled substance, not that h  
e had  
20 knowledge of the specific controlled substance, in this

21 case, heroin. You're okay with that?

22 MS. RUE: Yes, your Honor, the government would be  
23 satisfied.

24 THE COURT: Yes. All right, Mr. Horstmann, for  
25 discussion purposes that's where I am.

8

1 MR. HORSTMANN: Well, I sort of came in this  
2 morning prepared to complain if you hung me with a new  
rope.  
3 But be that as it may, I think -- I haven't read Woods  
so  
4 you have me at a disadvantage. Every other case that I  
5 looked at on constructive amendment last night, and I l  
looked  
6 at quite a few, quite a few, and the Second Circuit seems to  
ms to  
7 have wrestled with this issue quite a bit in terms of the  
he  
8 drug of conviction versus the drug of charge. In every  
9 other case there was some evidence presented at trial of the  
f the  
10 other drug. And the argument was whether the variance  
was  
11 so significant as to prejudice the defendant's rights.  
I

12 don't know how we can instruct this jury that they can  
come

13 back on any other drug.

14 THE COURT: We can't. We can't. That was err  
or.

15 I'm backing off the mention of cocaine. I will specifi  
cally

16 instruct the only, now, here, the only evidence we have  
at

17 all is evidence of heroin. Whether you believe that or,  
not

18 is entirely up to you, but that's the only evidence we  
have.

19 And, if you don't think that the, that the heroin was p  
roved

20 beyond a reasonable doubt leave Question 3 blank. One,  
I'll

21 know that that's what they think then. We'll deal with  
22 sentencing if we ever get there.

23 MR. HORSTMANN: The only other thing I would  
24 suggest then, your Honor, is, I don't believe they have  
the

25 indictment. Do they?

9

1 THE COURT: They do not.

2 MR. HORSTMANN: And I think that might cure a

lot

3 of the questions that they had yesterday, but it also  
4 creates some confusion because in your special verdict

form

5 I think you transposed --

6 THE COURT: I didn't transpose. I collapsed t

wo

7 counts.

8 MR. HORSTMANN: Yes. So, that's the only othe

r

9 suggestion I have.

10 THE COURT: Any objection to sending in the

of

11 indictment and saying that it's not, it's not evidence

12 course, but this is what the government's specifically

13 charged.

e no

14 MR. TOBIN: Your Honor, ordinarily I would hav

15 objection to sending in the indictment. In this case I

16 would because of the fear of confusion because --

17 THE COURT: I agree. I'm not sending in the

hink

18 indictment. But Mr. Hernandez's rights are saved. I t

we

19 I'm ready. If we -- why don't you step out and see if

20 have the jurors.

21 (Pause in proceedings.)



22 THE CLERK: Are we ready?

23 THE COURT: We are if you are. And bring the  
24 alternates here and then we'll move Ms. Kieval.

25 THE CLERK: Okay. All right.

10

at 1 MR. HORSTMANN: Judge, may I be heard briefly  
2 side bar before the jury comes in, there's something I  
3 wanted to mention that I forgot.

then 4 THE COURT: Let me fix the alternate business,  
5 I'll hear you --

6 MR. HORSTMANN: Okay.

e bar 7 THE COURT: -- rather that just run to the sid  
8 as soon as I have them in the courtroom. I will hear y  
ou 9 and then I'll give my charge.

10 THE CLERK: All rise for the jury.

:10 11 (Whereupon the jury entered the courtroom at 9  
12 a.m.)

13 (Whereupon the Court and the Clerk conferred.)

14 THE CLERK: Court is in session, please be sea



ted.

15 THE COURT: Good morning, ladies and gentlemen

16 THE JURY: Good morning.

17 THE COURT: Let the record show that eleven of  
the

18 twelve deliberating jurors and the two alternates are  
19 present in the courtroom.

20 Let me start as I said I would yesterday, and  
this

21 is very important, you are, each of you, on your oath a  
s  
22 jurors, including the alternates.

23 Since we recessed at 5:00 p.m. yesterday after  
noon,

24 have any of you, including the alternates, heard, read  
or

25 seen anything at all concerning this case? Have you

11

1 discussed this case with anyone? Have the deliberating  
2 jurors discussed the substance of the case with the  
3 alternates, or the alternates with the deliberating jur  
ors?

4 Has anyone else discussed the substance of the case wit  
h any  
5 of you?

6 THE JURY: No.

7 THE COURT: The jury and the alternates answer

8 the negative.

9 All right. We're missing Mr. Westberry. He's

10 the emergency room with his wife. He's at the emergenc

11 room with his wife not because she's been in an acciden

12 anything, but because she has been ill and wasn't respo

13 well, he wanted her in the hospital. So they went to t

14 emergency room.

15 So the event which sometimes happens has now

16 happened, and we are going to substitute for Mr. Westbe

17 the first alternate, which is Ms. Kieval.

18 So, Ms. Kieval, why don't you go up and take y

19 seat in the jury box.

20 That has the effect, ladies and gentlemen, as

21 told you at the outset of my charge that you start all

22 again. You just start from the beginning. Don't say t

23 Ms. Kieval we think this. Let her participate in the  
24 deliberations. She is equal to the rest of you. Let h  
er  
25 participate in the deliberations and you start afresh.

12

1 I am ready to give you further guidance, but I  
need

2 to talk with the lawyers for just one moment.

3 SIDEBAR CONFERENCE, AS FOLLOWS:

4 THE COURT: Yes, Mr. Horstmann?

5 MR. HORSTMANN: Yes. I had submitted an  
6 instruction on mere knowledge which I did not press wit  
h the  
7 Court because I was happy with the association and --

8 THE COURT: Right.

9 MR. HORSTMANN: -- other parts of the Court's  
10 charge. But I think now given the fact that --

11 THE COURT: Go ahead.

12 MR. HORSTMANN: -- it appears they're focused  
on  
13 knowledge, I will ask the Court to give a mere knowledg  
e  
14 instruction as well.

15 THE COURT: Noted, but I'm satisfied with the

16 charge.

17 But in that regard, I have the charge now in  
18 writing. I propose to send the original charge in. No  
19 objection?

20 MR. HORSTMANN: No objection.

21 MR. TOBIN: No, your Honor.

22 THE COURT: Very well.

23 (Whereupon the sidebar conference concluded.)

24 THE COURT: Since we're starting afresh, I thi

25 there are two additional things that properly I can do

13

1 help you all.

2 First, Mr. Womack has prepared my charge in

3 writing. So you will have the written charge there in

4 jury room with you. I've got to go over it, it will ta

5 a few minutes to check it out, but then we'll send it i

6 And I greatly appreciate his efforts in that regard.

7 I do have some additional instructions in lieu

8 directly answering your questions now that we're starti

ng  
at  
and  
ed to  
on 2,  
acy  
ove  
ove  
e  
e  
an  
w  
nd a

9 again. I do have some additional instructions about wh  
10 the government has to prove with respect to conspiracy  
11 knowledge since the jury as originally constituted seem  
12 be focusing on that.

13 These instructions start by focusing on Questi  
14 the conspiracy to import heroin. The gist of a conspir  
15 is an agreement to disobey or disregard the law. To pr  
16 conspiracy the government does not have to prove that a  
17 co-conspirator knew all of the details of a plan or  
18 participated in all of the objectives of a plan. To pr  
19 conspiracy the government must prove beyond a reasonabl  
20 doubt that Mr. Hernandez and at least one other  
21 co-conspirator, if you think there was a conspiracy, on  
22 other co-conspirator -- it may be Navarro, it could be  
23 unnamed co-conspirator. If you believe a meeting in Ne  
24 York took place. You have to believe these things beyo





25 reasonable doubt. But if you do, it doesn't have to be

14

1 witness, Mr. Navarro or Mr. Mercedes. It could be anot

2 person. But the minds of Mr. Hernandez and that other

3 person must meet and they must agree, and here's the

4 language, they must agree, each one of them, that they

5 going to conspire to import a serious controlled substa

6 Not that they have knowledge of a specific controlled

7 substance, but the conspiracy has to be a conspiracy, a

8 agreement to import as I've defined it a serious contro

9 substance.

10 Note the change from yesterday. Yesterday I

11 mentioned another drug. Cocaine. Please strike that o

12 And the reason is obvious. There's no evidence about

13 cocaine here at all. Don't start speculating about tha

14 There's no evidence in this case about cocaine. There'

15 evidence in this case about any drug but heroin. And t



quite properly you may ask yourselves, because you're focusing on Mr. Hernandez, did Mr. Hernandez know that was heroin. For conspiracy there has to be an agreement between Mr. Hernandez and at least one other conspirator where each one of them knew that they were conspiring to import a serious controlled substance. Now, that includes heroin. It has other things, but I'm not going to mention them. Serious controlled substance is the concept.

If you have a reasonable doubt as to whether Mr. Hernandez -- let's say you are convinced that he did

15

conspire and the conspiracy involved an agreement to import a serious controlled substance, he may then be found guilty of conspiracy. He could be found guilty on the first charge of aiding and abetting or by way of conspiracy found guilty on the first charge.

6 Again, by saying that I want also to say, if y  
ou  
7 have a reasonable doubt about any of those things he mu  
st be  
8 found not guilty of those charges. But if you have a  
9 reasonable doubt about whether he knew that it was hero  
in  
10 leave Question 3 blank. We're not interested in quanti  
ties  
11 if there's a reasonable doubt that he knew that that's  
what  
12 it was.

13 Now, I think that those additional instruction  
s are  
14 sufficient under the circumstances. As reconstituted,  
the  
15 jury may retire to commence your deliberations afresh.  
The  
16 jury may retire.

17 THE CLERK: All rise for the jury.

18 (Whereupon the jury left the courtroom at  
19 9:20 a.m.)

20 MR. TOBIN: Your Honor?

21 THE COURT: Please be seated. Yes?

22 MR. TOBIN: In addition to the instructions th  
at  
23 have been typed up and transcribed from yesterday, woul  
d it

ent 24 be possible to have today's supplemental instructions s  
25 in as well when they're complete to be --

16

1 THE COURT: It would and that makes good sense  
2 It's just a functional matter and we'll lean on Mr. Wom  
ack. 3 When, when they're prepared and I have reviewed them th  
ey 4 may be sent in.

5 MR. TOBIN: Thank you.  
6 MR. HORSTMANN: For the record, Judge, I objec  
t to 7 the instruction you just gave and it being sent in.

8 THE COURT: Since you had no objection to the  
-- 9 oh, you just don't like the instruction the way I frame  
d it.

10 MR. HORSTMANN: I don't like it.

11 THE COURT: Very well. Your rights are saved.  
And

12 I'm not so sure that objection is timely now that I let  
the

13 jury go out. But it's certainly timely as to sending i  
n the

14 supplementation and I am going to send in the  
15 supplementation. Your rights are saved.

16 MR. TOBIN: Your Honor, one additional matter.

I  
17 apologize. Although unusual, I'm going to ask that the  
18 Court consider revoking the conditions of the defendant  
's  
19 release during pendency of the deliberations.

20 THE COURT: That is unusual. I have done it.

But  
21 I decline to do that.

22 MR. TOBIN: Thank you.

23 THE COURT: He's been faithful in his attendan  
ce on  
24 the Court, and I don't think these questions suggest  
25 anything particular, and indeed, I have a reconstituted

17

1 jury.

2 MR. TOBIN: Thank you, your Honor.

3 THE COURT: So the questions are of less momen

t.  
4 We'll recess.

5 THE CLERK: All rise. Court is in recess.

6 (Recess.)

7 THE CLERK: All rise for the jury.

8 (Whereupon the jury entered the courtroom at  
9 10:17 a.m.)

10 THE CLERK: Court is in session, please be seated.

11 Madam Forelady, members of the jury, has the jury  
12 reached a unanimous verdict?

13 THE FORELADY: We have.

14 THE CLERK: Please pass the verdict slip.

15 (Papers passed.)

16 THE COURT: The verdict is in order, it may be  
17 recorded.

18 THE CLERK: Madam Forelady, members of the jury and

19 the alternate, please stand and listen to the verdict as

20 Court records it.

21 In the case of the United States of America v. Noel

22 Hernandez.

23 On the charge of importation of heroin, we find

24 Noel Hernandez guilty.

25 On the charge of conspiracy to import heroin, we

1 find Noel Hernandez guilty.

2 There is attributable to Noel Hernandez 874 gr  
ams  
3 of heroin.

4 Was Noel Hernandez an organizer and manager of  
a  
5 criminal enterprise involving less than five people? Y  
es.

6 So say you, Madam Forelady, so say you, member  
s of  
7 the jury?

8 THE JURY: Yes.

9 THE CLERK: Thank you. Please be seated.

10 THE COURT: Please be seated.

11 Ladies and gentlemen, I want to thank you. I  
thank

12 you not for your verdict. I would thank you whatever y  
our

13 verdict was. I want to thank you for the care, the  
14 attention, the courtesy, the promptness, your obvious  
15 involvement in this case.

16 By your verdict you've spoken the truth about  
these

17 charges. You're now free to go and free to talk to any  
one



18 about anything having to do with this case. In one res  
pect,  
19 I urge you, I cannot charge you, but I urge you, now th  
at  
20 you're at the end of your jury service, don't talk abou  
t  
21 what went on in the jury room. That's private to the t  
welve  
22 of you. Your verdict expresses your unanimous view.  
23 The litigants, the lawyers, no one can approac  
h you  
24 having to do with your verdict. The press might. You  
don't  
25 have to talk to them. And it's best that you not talk  
about

19

1 what went on in the jury room.  
2 I would like to thank you personally. So if y  
ou'll  
3 just stay in the jury room for just one moment, I'll be  
4 right back there.  
5 The jury may retire. I'll remain on the bench  
6 THE CLERK: All rise for the jury.  
7 (Whereupon the jury left the courtroom.)  
8 THE COURT: Please be seated.

9 Bail is revoked. Mr. Hernandez is remanded to  
the  
10 custody of the marshal.

11 I propose sentencing for the 24th of October a  
t  
12 2:00 p.m. Is that satisfactory to the government?

13 MR. TOBIN: It is, your Honor.

14 THE COURT: And Mr. Horstmann, is that  
15 satisfactory?

16 MR. HORSTMANN: I think my wife just bought pl  
ane  
17 tickets for that day.

18 Yes, your Honor, I'll be out of state.

19 THE COURT: Out of state that day.

20 THE CLERK: October 18th.

21 THE COURT: How about the 18th at 2:00?

22 MR. HORSTMANN: That's fine, your Honor.

23 THE COURT: Satisfactory?

24 MS. RUE: Thank you, your Honor.

25 THE COURT: So ordered. We'll recess.

20

1 THE CLERK: All rise. Court is in recess.

2 (Adjournment.)

C E R T I F I C A T E

I, Donald E. Womack, Official Court Reporter for  
the United States District Court for the District of  
Massachusetts, do hereby certify that the foregoing pages  
are a true and accurate transcription of my shorthand notes  
taken in the aforementioned matter to the best of my skill  
and ability.

---

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